Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States

KEVIN E. FIELDS,

Petitioner,

v.

MICHAEL WILBUR, *ET AL.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether 28 U.S.C. §1915(e)(1) vests the federal district courts with broad discretion to request counsel for indigent civil litigants, as the Second and Third Circuits have held, or instead requires an indigent civil litigant seeking counsel to demonstrate the existence of certain "exceptional circumstances" (including a likelihood of success on the merits) before the court can exercise its discretion to request counsel under § 1915(e)(1), as the Fifth, Sixth, Ninth, and Eleventh circuits have held.

2) Whether prison officials' failure to respond to a properly filed inmate grievance—in violation of the prison system's own regulations—exhausts the inmate's administrative remedies for purposes of the Prison Litigation Reform Act, as the Fifth, Sixth, Seventh, Eighth, and Tenth Circuits have held, or whether the prisoner's failure to secure a response to his grievance despite the prison's own failure to follow its regulations precludes a subsequent civil suit, as the Ninth Circuit held here.

LIST OF PARTIES

Petitioner

Kevin E. Fields

Respondents

Michael Wilbur

Jose Ruiz

John C. Rabe

Frank Fuhlrodt

Elizabeth Canfield

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INTRODUCTION

This case presents two important questions, each of which warrants this Court's review in its own right.

The first question involves the standard under which federal district courts may seek to appoint counsel for indigent civil litigants under 28 U.S.C. § 1915(e)(1). While the language of the statute on its face grants the trial court broad, unqualified discretion to request counsel—providing simply that "[t]he Court may request an attorney to represent any person unable to afford counsel" –the federal courts of appeals have developed three conflicting standards for determining whether a request for counsel is appropriate. This open and notorious conflict, which has mired the circuit courts in uncertainty, should be resolved now.

For their part, the Second and Third Circuits hew closely to the statutory language, giving district courts wide latitude to request counsel based on a non-exclusive list of factors that are relevant to the exercise of the district court's discretion. *See Tabron v. Grace*, 6 F.3d 147, 155 (3d Cir. 1993); *Hodge v. Police Officers*, 802 F.2d 58, 61 (2d Cir. 1986) (citing *Maclin v. Freake*, 650 F.2d 885, 887 (7th Cir. 1981)). In sharp contrast to this flexible approach, however, the Fifth, Sixth, Ninth and Eleventh Circuits sharply cabin that discretion by requiring indigent civil litigants to show, before a district court may even consider requesting counsel to represent them, that their case presents "exceptional circumstances." *See, e.g., Overholt v. Unibase Data Entry, Inc.*, No. 98-3302, 2000 WL 799760, at *4 (6th Cir. June 14, 2000); *Bass v. Perrin*, 170 F.3d 1312, 1320 (11th Cir.

1999); *Lavado v. Keohane*, 992 F.2d 601, 606 (6th Cir. 1993); *Santana v. Chandler*, 961 F.2d 514, 515 (5th Cir. 1992); *Aldabe v. Aldabe*, 616 F.2d 1089, 1093 (9th Cir. 1980). To meet this test, these courts then impose a standard lacking any basis in law or logic: They require the indigent *pro se* litigant seeking counsel to demonstrate *both* that he or she has a "likelihood of success on the merits" *and* that he or she lacks the ability "to articulate his [or her] claims *pro se* in light of the complexity of the legal issues involved." *See, e.g.*, App. 3a (quoting *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991) (internal quotations and citations omitted)).

Wholly apart from these courts' failure to ground this standard in the text of the relevant statute, not one of these courts has explained ***how*** indigent *pro se* litigants seeking counsel reasonably can be expected to simultaneously meet both prongs of this test. After all, if the claims at issue are too complex for an indigent *pro se* litigant to articulate on his or her own, how can he or she possibly hope to demonstrate a likelihood of success on the merits? Perhaps not surprisingly, then, this test has prompted significant inter- and intra-circuit debate over its propriety. *See Parham v. Johnson*, 126 F.3d 454, 457 n.6 (3d Cir. 1997) (Jones, J., sitting by designation) ("I have re-evaluated my position. I now agree that Congress did not intend nor did they state that appointment of counsel is only justified in 'exceptional circumstances'."); *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 n.3 (9th Cir. 1986) ("[W]e question how a court reasonably can expect a strong showing by a § 1983 claimant on the first prong when it is manifestly unlikely that a *pro se* petitioner involved in a complex case which he cannot litigate

effectively would be *capable* of demonstrating a likelihood of success on the merits.") (emphasis in original).

Finally, the Seventh Circuit has adopted its own hybrid approach, eschewing reliance on the Second and Third Circuits' multifactor test or the Fifth, Sixth, Ninth, and Eleventh Circuits' "exceptional circumstances" test, and asking instead whether "the plaintiff appear[s] to be competent to try [the case] himself and, if not, would the presence of counsel [make] a difference in the outcome." *Farmer v. Haas*, 990 F.2d 319, 322 (7th Cir. 1993).

Given the open disagreement among (and the sharp disputes within) the courts of appeals on this question, and in light of the importance of the assistance of counsel to indigent *pro se* litigants in pursuing complex civil claims, this Court's guidance on the proper standard for requesting counsel for indigent civil litigants is desperately needed.

The second question presented in this case involves the exhaustion requirement of the Prison Litigation Reform Act of 1995 ("PLRA"), 42 U.S.C. § 1997e(a). Four years ago this Court recognized that while prisoners must exhaust their available administrative remedies before transforming a prison grievance into a federal civil suit, there is a substantial "possibility that prisons might create procedural requirements for the purpose of tripping up all but the most skillful prisoners." *Woodford v. Ngo*, 548 U.S. 81, 102-03 (2006). The Court in that case, however, "ha[d] no occasion to decide how such situations might be addressed," *id.*, and thus specifically reserved judgment on that issue for a

future case in which it squarely was presented. This is that case.

The California State Prison System has established a three-tiered system of formal review for inmate grievances, and its regulations require every prisoner who wishes to pursue a grievance to obtain a decision from each level of the system in order to exhaust his or her remedies. To make that system work, the prison system's own regulations require the decisionmaker at each stage of the process to provide a written decision to the grievant within a certain time period. CAL. CODE REGS. tit. 15, § 3084.6(b).

There is no dispute in this case that prison officials violated those regulations here. In short, they *never* responded to Petitioner's properly and timely filed grievance at the intermediate level of review. And then they compounded that error by *refusing even to consider* Petitioner's grievance at the prison's third and final tier of review, on the ground that Petitioner had not first received a response to his grievance at the second level—that is, because prison officials violated binding regulations by failing to respond to his grievance at the second level.

Petitioner then filed suit against the State in the U.S. District Court for the Eastern District of California. Yet rather than concede its own responsibility, the State added insult to injury: It successfully sought summary judgment on Petitioner's federal civil claims regarding retaliation on the ground that Petitioner's grievance was not considered at the third level of review (even though Petitioner bore no responsibility for that failure, and despite Petitioner's effort to present his claim at that

level). Throughout the proceedings in the district court, including summary judgment and a jury trial on Petitioner's claims regarding the unsanitary conditions in his cell, Petitioner repeatedly asked the magistrate judge and district court to request counsel to represent him under 28 U.S.C. § 1915(e)(1). All six of Petitioner's requests for counsel, however, were denied, because the court determined that Petitioner's case did not present exceptional circumstances.

In upholding those refusals, the Ninth Circuit perpetuated the atextual "exceptional circumstances" test rejected by two other courts of appeals, and deepened a longstanding, three-way circuit split. This Court should intervene to resolve this split and bring a uniform standard to this important area of law.

Until the Ninth Circuit upheld the district court's grant of summary judgment for failure to exhaust on Petitioner's retaliation claim, the federal courts of appeals were unanimous in holding that the obvious frustration of the grievance process by prison officials, in violation of the prison's own regulations, is no barrier to judicial review. The Ninth Circuit in this case, however, created a clear split among the courts of appeals on the PLRA's exhaustion requirement. Given the recurring nature of exhaustion questions under the PLRA, *see Woodford*, 548 U.S. at 94 n.4, this Court should resolve the split that now has developed on the question reserved by *Woodford*.

OPINIONS BELOW

The Ninth Circuit's decision is not published in the official reporter, but is available at 2009 WL

5196075, and reprinted in the Appendix ("App.") at 1a-3a. The district court's final judgment is not published in the official reporter, and is not otherwise available, but is reprinted at App. 4a-5a. The district court's decision on summary judgment is not published in the official reporter, but is available at 2007 WL 2688453, and is reprinted at App. 6a-8a. The district court's decisions on Petitioner's motions for counsel are not published in the official reporter, and are not otherwise available, but are reprinted at App. 35a-54a.

JURISDICTION

The Ninth Circuit *rendered its decision on* December 29, 2009, App. 1a, and denied a timely filed petition for rehearing *en banc* on March 1, 2010, App. 55a-56a. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT UNITED STATES CODE PROVISIONS AND CALIFORNIA STATE REGULATIONS

42 U.S.C. § 1997e(a) provides in pertinent part:

Suits by Prisoners.

(a) Applicability of administrative remedies

No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

28 U.S.C. § 1915(e)(1) (formerly codified at 28 U.S.C. § 1915(d)) provides in pertinent part:

Proceedings in forma pauperis

(e)(1) The court may request an attorney to represent any person unable to afford counsel.

CAL. CODE REGS. tit. 15, § 3084.1(a) provides in pertinent part:

Right to Appeal.

(a) Any inmate or parolee under the department's jurisdiction may appeal any departmental decision, action, condition, or policy which they can demonstrate as having an adverse effect upon their welfare. The decisions of the Departmental Review Board which serve as the director's level decision are not appealable and conclude the inmate's or parolee's departmental administrative remedy pursuant to section 3376.1.

CAL. CODE REGS. tit. 15, § 3084.5(g) provides in pertinent part:

(g) Written response. At each level of review not waived, the original appeal shall be returned to the appellant with a written response stating the appeal issue and reasons for the decision.

CAL. CODE REGS. tit. 15, § 3084.6(b)

Appeal Time Limits.

(b) Departmental response. Appeals shall be responded to and returned to the appellant by staff within the following time limits:

(1)Informal level responses shall be completed within ten working days.

(2)First level responses shall be completed within 30 working days.

(3)Second level responses shall be completed within 20 working days, or 30 working days if first level is waived pursuant to section 3084.5(a)(3).

(4)Third level responses shall be completed within 60 working days.

(5)Exception is authorized in the event of:

(A)Unavailability of the appellant, or staff or inmate witnesses.

(B)Complexity of the decision, action, or policy.

(C)Necessary involvement of other agencies or jurisdictions.

(6)Except for the third formal level, if an exceptional delay prevents completion of the review within specified time limits, the appellant shall be informed in writing of the reasons for the delay and the estimated completion date.

STATEMENT OF THE CASE

A. Background

On October 10, 2002, the toilet in Petitioner's cell overflowed and his cell was flooded with water, urine, and human feces. (App. 22a-23a.) As the testimony at trial established, for nearly a month, the guards' only effort to remedy this situation was

to give Petitioner a bar of soap and to periodically mop the area outside of Petitioner's cell. (5/28/08 Trial Tr. 198:18-200:9.)

Petitioner filed an administrative complaint (a California Department of Corrections Inmate/Parolee Appeal Form 602 or, simply, "Form 602"), as is required by CAL. CODE REGS. tit. 15, § 3084.5(g), that detailed the guards' failure to sanitize his cell and objected to being served meals in such unsanitary conditions. (App. 19a.) In retaliation for filing that grievance, the guards began limiting Petitioner's daily food rations. (Plaintiff's Declaration in Supporting Opposition to Defendants [sic] Motion for Summary Judgment, at 5 (4/16/07).) On October 28, 2002, Petitioner therefore filed a second Form 602 seeking redress for the guards' retaliation. (Form 602, Claim No. 02-03865, at App. 57a.) These two distinct (if related) grievances ultimately led to this Petition.

The administrative appeal process in California prisons has an initial "informal" level of review followed by three "formal" levels of review. *See Woodford*, 548 U.S. at 85. An appeal denied at any level may be pursued to the next level of appeal, terminating with an appeal to the Director of the California Department of Corrections ("Director's Level"). CAL. CODE REGS. tit. 15, § 3084.1(a); *Woodford*, 548 U.S. at 86.

Petitioner's initial grievance, regarding the unsanitary conditions in his cell, ultimately was denied at all three formal levels of review. (App. 19a.) With respect to the second grievance, regarding the guards' retaliation, Petitioner bypassed the optional, informal level of review and

proceeded directly with the first formal level of review. At that stage, prison officials denied Petitioner's appeal. (Form 602, Claim No. 02-03865, Parts C-E, at App. 58a-60a.) Petitioner then appealed to the second formal level of review, and the Form 602 indicates that his appeal was assigned to an unnamed individual on March 13, 2003, with a decision due by April 11, 2003. (*Id.* at Part G, at App. 60a.)

There is no indication on the Form 602, however, that a decision was ever rendered at the second level of review or that the form was ever returned to Petitioner (as California regulations require). *Id.*; CAL. CODE REGS. tit. 15, § 3084.5(g). A prison official eventually filed a declaration with the district court stating that the appeal was "canceled" on March 13, 2003 (App. 20a), the same day that the form indicates the appeal was assigned for review (App. 60a), but it is undisputed that Petitioner was *never notified* of that alleged cancellation (as would have been required by CAL. CODE REGS. tit. 15, §§ 3084.5(g), 3084.6(b)), and that he received *no* other response to his second-level appeal (least of all one within the period of time required by the prison regulations). CAL. CODE REGS. tit. 15, § 3084.6(b). Nor was Petitioner provided with an explanation of the reason for any decision on his appeal as required by prison regulations. CAL. CODE REGS. tit. 15, § 3084.5(g).

Having thus received no response at the second formal level of administrative review, and out of an abundance of caution, Petitioner appealed to the Director's Level. That appeal was returned along with a letter from N. Grannis, the Chief of the

Inmate Appeals Branch ("Grannis Letter"), stating that the appeal was being returned unheard, because it had been "rejected, withdrawn or cancelled" at the second formal level of review. (App. 64a-65a.) This was the first indication of any sort that Petitioner received regarding what might have happened to his appeal at the second formal level of review. If Petitioner had any questions, the letter continued, they should be taken up with the Appeals Coordinator. The letter gave no indication that Petitioner could appeal the rejection, withdrawal, or cancellation of his second level appeal, much less that there was any administrative mechanism through which he could appeal the rejection of his Director's Level appeal.

B. Procedural History

On October 31, 2003, after receiving the Grannis Letter, Petitioner filed a *pro se* complaint against several prison officials in the United States District Court for the Eastern District of California, alleging violations of 42 U.S.C. § 1983. Petitioner's Second Amended Complaint raised two claims under § 1983: (1) that prison officials violated the Eighth Amendment by causing Petitioner to live in a cell contaminated with human waste for nearly a month (the subject of his first grievance); and (2) that prison officials violated Petitioner's First Amendment rights by retaliating against him for filing a grievance regarding his Eighth Amendment claims (the subject of his second grievance). (App. 9a-10a.)

On December 21, 2006, Respondents moved for summary judgment on all of Petitioner's claims. (App. 10a.) The Magistrate Judge recommended that summary judgment on Petitioner's Eighth

Amendment claims be denied, finding that Petitioner had raised sufficient issues of triable fact. (App. 33a.) The Magistrate Judge also recommended that the defendants' claim of qualified immunity be denied, explaining that "[b]y 2002, requiring an inmate to live in a cell with a malfunctioning toilet for 28 days constituted a knowing violation of the Eighth Amendment." (App. 33a.)

Over Petitioner's objection, however, the Magistrate Judge recommended that Petitioner's retaliation claim be dismissed for failure to exhaust his administrative remedies. According to the Magistrate Judge, Petitioner's grievance was canceled at the second formal level of review, and Petitioner never appealed to the Director's Level. (App. 19a-20a.)

Both Petitioner and Respondents objected to the Magistrate Judge's report. (App. 7a.) For his part, Petitioner objected to the Magistrate Judge's recommendation that his retaliation claim be dismissed for failure to exhaust administrative remedies. Petitioner attached the Grannis Letter, which accompanied his returned appeal to the Director's Level. (App. 64a-65a.) Petitioner then argued that he had in fact exhausted his administrative remedies, because the Grannis Letter demonstrated (contrary to the Magistrate Judge's assertion) that he had in fact pursued his appeal to the Director's Level of review. Finally, Petitioner maintained that, at the very least, he was entitled to an evidentiary hearing to resolve the conflict between Respondents' declaration, which claimed Petitioner had not pursued a Director's Level appeal, and the Grannis Letter.

On September 9, 2007, without any substantive discussion, the district judge adopted the Magistrate Judge's findings and recommendations in full. (App. 6a-8a.) The Judge dismissed, over Petitioner's objections, the retaliation claim, granting in part the Respondents' motion for summary judgment. (App. 7a-8a.) Petitioner represented himself in the subsequent jury trial on his Eighth Amendment claim. The jury returned a verdict in favor of the Respondents.

Petitioner appealed both the summary judgment on his retaliation claim (on exhaustion grounds) and the jury verdict on his Eighth Amendment claim (on the basis that counsel should have been requested). After hearing oral argument, the Ninth Circuit affirmed the decision below in a three-page, unpublished decision. (App. 1a-3a.) It held that Petitioner did not exhaust his administrative remedies because "an additional avenue of possible relief remained open to him"--namely, "contact[ing] the Appeals Coordinator." (App. 2a.) Regarding the jury verdict, the Ninth Circuit held Petitioner did not demonstrate "exceptional circumstances" and that his requests for counsel were, accordingly, properly denied. (App. 3a.)

REASONS FOR GRANTING THE WRIT

First, the "exceptional circumstances" standard for requesting counsel to represent indigent civil litigants, which is followed by the Fifth, Sixth, Ninth and Eleventh Circuits, cannot be reconciled with the plain text of 28 U.S.C. § 1915(e)(1) and flatly contradicts the flexible approach taken in the Second and Third Circuits. No court has ever provided a principled basis for the "exceptional circumstances" test, and as other circuit courts (and a dismayed panel of the Ninth Circuit) have recognized, there is no such basis. This Court's intervention is critically needed both to resolve this dispute among the circuits and to provide principled guidance to trial courts.

Second, the Ninth Circuit's decision in this case departs from each of the five other circuits to have considered how prison officials' failure to comply with binding prison regulations impacts an inmate's right to redress in federal court, by holding that Petitioner failed to exhaust his administrative remedies despite prison officials failure to respond to his properly filed grievance in the manner and within the time provided by the prison's own regulations. Until now, the appellate courts were united in holding that prison officials' failure to respond to a prisoner's grievance exhausts the prisoner's available remedies. Review by this Court is necessary to restore uniformity on this important issue of national application.

I. The Circuits Are Deeply Divided Over The Appropriate Standard For Requesting Counsel For Indigent Civil Litigants, And The "Exceptional Circumstances" Test

Applied By The Ninth Circuit In This Case Is Both Contrary To The Statute's Text And Unworkable In Practice.

The circuit courts have divided over the proper standard for requesting counsel for indigent civil litigants for more than 25 years, and that divide has only continued to deepen. Moreover, the exceptional circumstances test applied by the Ninth Circuit in this case, and by the Fifth, Sixth, and Eleventh Circuits in prior cases, is directly contrary to the text of 28 U.S.C. § 1915(e)(1). That departure from the statutory text is of real consequence; in practice, the exceptional circumstances test amounts to a near-total elimination of the discretion Congress granted the federal district courts.

The circuit courts are sharply divided on the proper standard to apply to requests from indigent civil litigants for counsel. For their part, the Fifth, Sixth, Ninth, and Eleventh Circuits all strictly condition the district courts' exercise of the statute's otherwise unqualified grant of discretion to cases presenting "exceptional circumstances," despite the fact that the statute itself contains no such limitation. *See, e.g.*, *Overholt*, 2000 WL 799760, at *4 (refusing to request counsel under § 1915(e)(1), "because there are no exceptional circumstances warranting the appointment of counsel"); *Bass*, 170 F.3d at 1320 ("The district court...should appoint counsel only in exceptional circumstances") (internal citation omitted); *Lavado*, 992 F.2d at 605-06 (6th Cir. 1993) ("Appointment of counsel in a civil case ... is justified only by exceptional circumstances.") (internal citations and quotations omitted); *Santana*, 961 F.2d at 515 ("Such an appointment is

appropriate in a case that presents 'exceptional circumstances.'"); *Aldabe*, 616 F.2d at 1093 ("As the district court held, however, this court has limited the exercise of th[e] power [to request counsel for indigent, civil litigants] to exceptional circumstances.").

By contrast, the Third Circuit has rejected this standard outright, holding that such strict limits on the trial court's discretion are both unnecessary and contrary to the text of the statute:

> Nothing in [§ 1915(e)(1)'s] clear language suggests that appointment [of counsel] is permissible only in some limited set of circumstances. Nor have we found any indication in the legislative history of the provision to support such a limitation. Accordingly, we conclude that the magistrate judge erred as a matter of law in stating that he had no discretion to appoint counsel in the absence of "exceptional circumstances."

Tabron, 6 F.3d at 155. The Second Circuit likewise has rejected the exceptional circumstances test in favor of an open-ended list of relevant factors to consider:

> We think the factors described in *Maclin* are appropriate for the trial court to consider in exercising its discretion to appoint counsel pursuant to 28 U.S.C. § 1915(d) [now recodified at § 1915(e)(1)]. We recognize that some circuits appear to take a more stringent approach than *Maclin* to appointment of counsel [citing the Ninth Circuit's exceptional circumstances standard] . . . . In

> our view, however, the *Maclin* factors find the proper middle ground.

Hodge, 802 F.2d at 61 (citing *Maclin*, 650 F.2d at 887).

Finally, the Seventh Circuit, which pioneered the multi-factor approach, has since abandoned the *Maclin* test in favor of something between the standard followed in the Second and Third Circuits and the exceptional circumstances test applied by the Fifth, Sixth, Ninth, and Eleventh Circuits. *See Farmer*, 990 F.2d at 321-22 ("[T]he necessary inquiry is simpler than *Maclin's* multifactorial approach implies: given the difficulty of the case, did the plaintiff appear to be competent to try it himself and, if not, would the presence of counsel have made a difference in the outcome?").

It bears particular note that this conflict *among* the appellate courts also has fostered disagreements *within* those courts. Thus, while the Sixth Circuit continues to follow the exceptional circumstances test, Judge Jones—who authored the Sixth Circuit's leading opinion on the issue—since has rejected the test. *See Parham*, 126 F.3d at 457 n.6 (Jones, J., sitting by designation) ("I have re-evaluated my position. I now agree that Congress did not intend nor did they state that appointment of counsel is only justified in 'exceptional circumstances'."). And at least one panel of the Ninth Circuit has sharply condemned the exceptional circumstances test, deeming it both "incoheren[t]" and inconsistent with the law. *See Wilborn*, 789 F.2d at 1332 n.3.

The fact that such strong disagreement persists both among and within the circuits is all the more unusual, because the statute itself is so clear on this

issue. It provides simply that "[t]he court may request an attorney to represent any person unable to afford counsel." 28 U.S.C. § 1915(e)(1). By its plain terms, this provision thus gives broad—uncabined—discretion to trial courts to decide on a case-by-case basis whether to request counsel for indigent litigants. Nevertheless, the Ninth Circuit, along with the Fifth, Sixth, and Eleventh circuits, have engrafted a standard of pure "judicial creation" onto the statute, *Parham*, 126 F.3d at 457 n.6, in a manner unsupported by law or logic.

Make no mistake: the standard here matters, and the differences between the courts' varied approaches are more than simply word-play. The Second and Third Circuits regularly request counsel for indigent litigants under the statute. *See, e.g.*, *Rivas v. Suffolk County*, Nos. 04-4813-pr, 04-5198-pr, 2008 WL 45406, at *2 (2d Cir. Jan. 3, 2008) ("Given the complexity of the factual and legal issues presented by this case, we remand to the district court to reappoint *pro bono* counsel."); *Tafari v. Hues*, 473 F.3d 440, 442 (2d Cir. 2007) ("In August 2005, this Court granted Tafari IFP status for the purposes of this appeal and ordered the appointment of counsel pursuant to 28 U.S.C. § 1915(e)(1) 'because the issues raised are important and unresolved.'"); *Woodham v. Sayre Borough Police Dep't*, 191 F. App'x 111, 116 (3d Cir. 2006) ("Under the circumstances, the District Court's repeated denials of Woodham's motions were not consistent with the sound exercise of discretion."); *Bennett v. Goord*, 343 F.3d 133, 139 (2d Cir. 2003) ("Although leaving to the district court the resolution of any request for appointment of counsel, we note that Bennett appears plainly to meet the threshold requirement

that his claims are likely to be of substance."); *Montgomery v. Pinchak*, 294 F.3d 492, 505 (3d Cir. 2002) ("Given our analysis of the *Tabron* factors and our assessment of the District Court's clear errors in applying those factors, we conclude that the District Court abused its discretion in refusing to appoint counsel for Montgomery, either upon Montgomery's initial motion prior to discovery, or later in the proceedings when it became apparent that the appointment of counsel would be particularly appropriate in this instance.").

Yet, in notable contrast, the Ninth Circuit (which given its size likely has more opportunities to consider this matter than any other circuit) appears to have found its judicially crafted "exceptional circumstances" test satisfied *only a single time*. *See Agyemen v. Corrs. Corp. of Am.*, 390 F.3d 1101, 1104 (9th Cir. 2004). In practice, thus, the exceptional circumstances test amounts to a near-total deprivation of court-requested counsel for indigent civil litigants.

It thus should come as no surprise that both the trial court and the Ninth Circuit rejected Petitioner's requests for counsel here. In this case, the district court held it could not even consider requesting counsel to represent Petitioner in his jury trial concerning his constitutional challenge to the conditions in which he had been held, because "[e]ven if it is assumed that plaintiff is not well versed in the law and that he has made serious allegations which, if proved, would entitle him to relief, his case [was] not exceptional." (App. 54a.) Yet the courts paid no heed to the conditions under which Petitioner was expected to make such a

showing. At the time he sought counsel, it is undisputed that he was confined to his cell 23 hours a day and unable even to make phone calls. Nor is it disputed that during the period in question, Petitioner was being heavily medicated with strong narcotics to treat a chronic pain condition.

These are precisely the sort of considerations that one would expect a trial court to rely upon in assessing whether to request counsel. Yet the court here found itself bound to reject Petitioner's request because he had not met the Ninth Circuit's rigid, "exceptional circumstances" test for obtaining counsel. Nothing in § 1915(e)(1) even remotely indicates trial courts lack the ***discretion*** to request counsel in such situations. Yet, this is just what the exceptional circumstances test did here; it stripped the trial court in this case of any discretion to request counsel for Petitioner.

That approach, as another Ninth Circuit panel recognized, is untenable and indeed "incoheren[t]." *See Wilborn*, 789 F.2d at 1332 n.3. As the *Wilborn* panel explained, the exceptional circumstances test requires a *pro se* litigant to show that, on the one hand, he has a substantial likelihood of success on the merits, and that on the other hand the case is too complex for him to effectively litigate it. *Id.* "[W]e question how," the *Wilborn* panel noted, "a court reasonably can expect a strong showing by a § 1983 claimant on the first prong when it is manifestly unlikely that a *pro se* petitioner involved in a complex case which he cannot litigate effectively would be *capable* of demonstrating a likelihood of success on the merits." *Id.* (emphasis in original). Nevertheless, that panel applied the exceptional

circumstances test as described, because it was bound by Ninth Circuit precedent, as was the court here. This Court is not so limited, and its intervention is, accordingly, desperately needed to resolve the circuits' confusion on this important and recurring question and to reverse the "incoheren[t]" result reached by the Ninth Circuit in this case.

II. The Ninth Circuit's Holding That Petitioner Failed To Exhaust His Retaliation Claim Creates A Split With Five Circuits, Each Of Which Has Held That Claims Are Adequately Exhausted Once Prison Officials' Fail To Follow Their Own Regulations.

In holding that Petitioner's retaliation claim was not properly exhausted—despite the fact that prison officials never responded to Petitioner's grievance at the second formal level of review—the panel directly contradicted the holdings of five other circuits that previously considered the effect of prison officials' failure to respond on exhaustion claims under the PLRA. The need for uniformity in this area is particularly important; uncertainty and inconsistency are not only unfair to imprisoned (and often unrepresented) litigants, but will needlessly waste both prison resources (as litigants attempt to ensure their claims are exhausted) and judicial resources (as prisoners pursue claims in federal court believing them exhausted, only to have those claims dismissed after significant resources have been expended). This Court's review is necessary both to repair the split among the circuits and to bring certainty to this important area of law.

Each of the circuits that has considered this question has rejected the Ninth Circuit's apparent reasoning in this case. In particular, the Fifth, Sixth, Seventh, Eighth, and Tenth Circuits have held that where prison officials fail to respond to a prisoner's grievance within the time required by prison regulations, the prisoner's claim is deemed exhausted under the PLRA. *See Baughman v. Harless*, 142 F. App'x 354, 359 (10th Cir. 2005) (quoting *Jernigan v. Stuchell*, 304 F.3d 1030, 1032 (10th Cir. 2002)); *Boyd v. Corrs. Corp. of Am.*, 380 F.3d 989, 996 (6th Cir. 2004) ("Following the lead of the four other circuits that have considered this issue, we conclude that administrative remedies are exhausted when prison officials fail to timely respond to a properly filed grievance."); *Lewis v. Washington*, 300 F.3d 829, 833 (7th Cir. 2002) ("We join the Eighth and Fifth circuits on this issue because we refuse to interpret the PLRA 'so narrowly as to . . . permit [prison officials] to exploit the exhaustion requirement through indefinite delay in responding to grievances.'") (quoting *Goodman v. Carter*, No. 2000 C 948, 2001 WL 755137, at *3 (N.D. Ill. July 2, 2001)) (alteration in original); *Foulk v. Charrier*, 262 F.3d 687, 698 (8th Cir. 2001) (holding prisoner's administrative remedies were exhausted when prison officials failed to respond to his complaint, making it impossible for him to pursue the complaint to further levels of review); *Powe v. Ennis*, 177 F.3d 393, 394 (5th Cir. 1999) ("A prisoner's administrative remedies are deemed exhausted when a valid grievance has been filed and the state's time for responding thereto has expired."). As the Tenth Circuit explained in *Baughman*: "[P]rison officials' 'failure to respond to a grievance within the time

limits contained in the grievance policy renders an administrative remedy unavailable.'" 142 F. App'x at 359 (quoting *Jernigan*, 304 F.3d at 1032).

That makes perfect sense: The PLRA is intended to give prison officials an opportunity to respond to and resolve a prisoner's grievance before the prisoner files suit. But, where prison officials fail to respond to properly filed grievances, they cannot later complain that they were deprived of the opportunity to do so—and, needless to say, prisoners like Petitioner cannot force officials to obey their own regulations and answer prisoners' claims. In short, where prison officials fail to seize the opportunity provided them to address a prisoner's claims in the first instance, the prisoner is entitled to pursue his claim in court.

In this case, the State has never disputed that prison officials failed to respond to Petitioner's grievance at the second level of formal review. Instead, it argued, and the Ninth Circuit held, that Petitioner's claim became (in effect) un-exhausted, because he nevertheless pursued his appeal to the Director's Level—where it was screened out and rejected without consideration on the merits—and was ***then*** told that he should contact the Appeals Coordinator. But, as every other circuit to consider the issue has recognized, that is irrelevant. Petitioner's claim was exhausted at the point when prison officials failed to respond to his grievance at the second, formal level of review, and the fact that Petitioner pursued further internal review (which once again yielded no decision on the merits) provides no license for punishing Petitioner by denying him access to the federal courts.

In any event, the Grannis Letter's instruction to contact the Appeals Coordinator did not make administrative remedies available to Petitioner, because under the prison's own regulations, the Appeals Coordinator could provide no relief. As this Court has recognized, "[w]ithout the possibility of some relief, the administrative officers would presumably have no authority to act on the subject of the complaint, leaving the inmate with nothing to exhaust." *Booth v. Churner*, 532 U.S. 731, 736 n.4 (2001). Given the prison's official position regarding Petitioner's claim—that it could not be reviewed at the Director's Level because it had been "rejected, withdrawn or cancelled"—the prison's regulations did not provide any mechanism for the Appeals Coordinator to grant Petitioner any relief.

It thus makes no sense to hold, as the Ninth Circuit did here, that Petitioner lost his right to proceed to federal court because he was given an *ad hoc* instruction to jump through an additional hoop that was not required by prison regulations and that in any event provided no possibility of relief. After all, the point of the exhaustion requirement is to ensure that "the grievant complies with the system's critical procedural rules," *Woodford*, 548 U.S. at 95, not that he or she overcome additional hurdles placed in his way.

The bottom line here is that no one disputes that Petitioner complied with all of the prison's actual regulations—and that prison officials did not. In any other circuit, Petitioner would have been free to pursue his claims in federal court; yet by declaring Petitioner's claims unexhausted, the decision below creates a circuit split where none previously existed.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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FILED

DEC 29 2010

Molly C. Dwyer, Clerk
U.S. Court of Appeals

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 08-16598

Appeal from the United States District Court for the Eastern District of California

Lawrence J. O'Neill, District Judge, Presiding

D.C. No. CV-03-06364-LJO-DLB

MEMORANDUM*

- x

KEVIN E. FIELDS

Plaintiff - Appellant,

v.

WILBUR; et al.,

Defendants - Appellees.

- x

Argued and Submitted December 9, 2009
San Francisco, California

Before: COWEN,** GRABER, AND BYBEE,
Circuit Judges.

Plaintiff Kevin E. Fields, a California state prisoner, appeals from the entry of summary judgment against him in his 42 U.S.C. § 1983 action alleging that prison officials of the California Department of Corrections and Rehabilitation (Defendants), violated his constitutional rights. On de novo review, *Dietrich v. John Ascuaga's Nugget*, 548 F.3d 892, 896 (9th Cir. 2008), we affirm.

1. Plaintiff was required to exhaust all available administrative remedies before filing this action in federal court. 42 U.S.C. § 1997e(a); *see also Booth v. Churner*, 532 U.S. 731, 738-39 (2001) (holding that exhaustion of the administrative process is required so long as there is a "possibility of some relief"). The letter sent by the Inmate Appeals Branch to Plaintiff on March 24, 2003, explicitly instructed Plaintiff to contact the Appeals Coordinator if he disagreed with the rejection of his grievance appeal. Plaintiff did not contact the Appeals Coordinator before filing a complaint in the district court. Because an additional avenue of possible relief remained open to him, which he chose not to pursue, Plaintiff failed to exhaust all available administrative remedies.

2. We review for abuse of discretion a district court's denial of appointment of counsel. *Palmer v. Valdez*, 560 F.3d 965, 970 (9th Cir. 2009), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. Aug. 31, 2009) (No. 09-6429). Plaintiff demonstrated sufficient verbal and writing ability and legal knowledge to articulate his claim. The facts that he alleged and the issues that he raised were not of substantial complexity. In sum, exceptional circumstances that would require appointment of counsel do not exist here. *See* 28 U.S.C. § 1915; *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991) (holding that a finding of exceptional circumstances requires an evaluation of both "the likelihood of success on the merits and the ability of the petitioner to articulate his claims *pro se* in light of the complexity of the issues involved" (internal quotation marks omitted)).

AFFIRMED.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The Honorable Robert E. Cowen, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

UNITED STATE DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
CASE NO: 1:03-CV-06364-LJO-DLB

JUDGMENT IN A CIVIL CASE

- - - -

by: /s/ I. Lira
Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

1:03-cv-06364-OWW-DLB-P

ORDER ADOPTING FINDINGS AND RECOMMENDATIONS (Doc. 159)

ORDER GRANTING MOTION FOR VOLUNTARY DISMISSAL OF CERTAIN DEFENDANTS (Doc. 154)

ORDER GRANTING IN PART MOTION FOR SUMMARY JUDGMENT (Doc. 144)

- x

KEVIN E. FIELDS

Plaintiff,

v.

RUIZ et al.,

Defendants.

- x

Plaintiff, Kevin Fields ("plaintiff"), is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983.

The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 72-302.

On June 25, 2007, the Magistrate Judge filed Findings and Recommendations herein which were served on the parties and which contained notice to the parties that any objections to the Findings and Recommendations were to be filed on or before July 25, 2007. On July 16, 2007, plaintiff filed objections to the Magistrate Judge's Findings and Recommendations. On July 25, 2007, defendants filed objections to the Magistrate Judge's Findings and Recommendations.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 73-305, this Court has conducted a *de novo* review of this case. Having carefully reviewed the entire file, the Court finds the Findings and Recommendations to be supported by the record and by proper analysis.

Accordingly, IT IS HEREBY ORDERED that:

1. The Findings and Recommendations, filed June 25, 2007, are ADOPTED IN FULL;

2. Plaintiff's motion for voluntary dismissal of defendants Robertson and Dill, filed April 11, 2007, is GRANTED;

3. Defendants' motion to dismiss the retaliation claim against defendants, Ruiz, Wilbur, Canfield,

and Fulbrodt is GRANTED WITHOUT PREJUDICE;

4. Defendants' motion for summary judgment, filed December 21, 2006, is GRANTED IN PART; and,

5. This case shall proceed to trial on plaintiff's Eighth Amendment claims against defendants Ruiz, Wilbur, Canfield, Fuhlrodt, and Rabe.

IT IS SO ORDERED.

Dated: September 9, 2007

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CASE NO. 1:03-CV-6364-OWW DLB-P

FINDINGS AND RECOMMENDATIONS RECOMMENDING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BE DENIED IN PART (Doc. 144)

OBJECTIONS DUE JULY 25, 2007

KEVIN E. FIELDS

Plaintiff,

v.

RUIZ et al.,

Defendant.

I. Defendant's Motion for Summary Judgment

A. Procedural History

Plaintiff is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. This action is proceeding on

plaintiff's second amended complaint, filed February 9, 2004, against defendants Robertson, Ruiz, Wilbur, Canfield, Fuhlrodt, Rabe and Dill. ("defendants") for violation of the Eighth Amendment based on the conditions of his cell and for retaliation. On April 11, 2007, plaintiff filed a motion for an order dismissing defendants Robertson and Dill. This request will be granted.

On December 21, 2006, defendants filed a motion for summary judgment. Plaintiff filed an opposition on April 16, 2007.[1] Defendants did not reply.

B. Legal Standard

Summary judgment is appropriate when it is demonstrated that there exists no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Under summary judgment practice, the moving party

> [A]lways bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings,

[1] Plaintiff was provided with notice of the requirements for opposing a motion for summary judgment by the court in an order filed on June 21, 2004. *Klingele v. Eikenberry*, 849 F.2d 409 (9th Cir. 1988).

> depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). "[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the 'pleadings, depositions, answers to interrogatories, and admissions on file.'" *Id.* Indeed, summary judgment should be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Id.* 322. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* In such a circumstance, summary judgment should be granted, "so long as whatever is before the district court demonstrates that the standard for entry of summary judgment, as set forth in Rule 56(c), is satisfied." *Id.* 323.

If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586

(1986). In attempting to establish the existence of this factual dispute, the opposing party may not rely upon the denials of its pleadings, but is required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in support of its contention that the dispute exists. Rule 56(e); *Matsushita*, 475 U.S. at 586 n.11. The opposing party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmoving party, *Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1436 (9th Cir. 1987).

In the endeavor to establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *T.W. Elec. Serv.*, 809 F.2d at 631. Thus, the "purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.'" *Matsushita*, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e) advisory committee's note on 1963 amendments).

In resolving the summary judgment motion, the court examines the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any. Rule 56(c). The evidence of the opposing party is to be believed, *Anderson*, 477 U.S. at 255, and all reasonable inferences that may be drawn from the facts placed before the court must be drawn in favor of the opposing party, *Matsushita*, 475 U.S. at 587 (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam). Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. *Richards v. Nielsen Freight Lines*, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), *aff'd*, 810 F.2d 898, 902 (9th Cir. 1987).

Finally, to demonstrate a genuine issue, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts. Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 587 (citation omitted).

C. Discussion

1. Plaintiff's Allegations

In his second amended complaint, plaintiff alleges that defendants violated his rights under the Eighth Amendment by leaving him a cell with an overflowing toilet for 28 days. Plaintiff also alleges that defendants Ruiz, Wilbur, Canfield and Fuhlrodt

retaliated against him for filing a grievance by serving him disproportionately small servings at dinner.

2. Defendants' Undisputed Facts[2]

A. **Background**

1. Plaintiff is properly in the custody of the California Department of Corrections and Rehabilitation (CDCR) pursuant to a valid judgment in the San Joaquin County Court in which he was convicted of assault with a deadly weapon with force likely to cause great bodily injury, plus enhancements, and sentenced to a term of 25 years to life. Defendants' Exhibit A, Attachment 1, p.2-3. Plaintiff was housed in the Security Housing Unit (SHU) at California State Prison - Corcoran (CSP-Cor) at times material to the matters at issue. DX A-1, p.5.

2. Defendant Dill was a Facility Captain; defendant Rabe was a Facility Lieutenant, defendant Fuhlrodt was a Correctional Sergeant and defendants Ruiz, Wilbur and Canfield were

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[2] Plaintiff did not file a separate statement of disputed facts. The Undisputed Facts are taken from Defendants' Statement of Undisputed Facts and Plaintiff's Opposition to Defendants' Motion for Summary Judgment.

Correctional Officers at CSP-Cor at times material to the matters at issue. Compl. p.2-4; ¶¶ 5-11.

3. Fields was received by CDCR on June 26, 2000, and housed at the Deuel Vocational Institution (DVI). DX A-1, p.6. Fields was placed in administrative segregation on July 12, 2000. DX A-1, p.7-41.

4. Fields was transferred to the SHU at CSP Corcoran on December 1, 2000. DX A-1, p.5.

5. Assignment to the SHU is not based on the inmates' underlying offense, but rather, the SHU is an administrative means of managing inmates who commit serious disciplinary infractions once in prison, or who become affiliated with a prison gang. DX B, Cal. Code Regs. § 3341.5, subd.(c). Thus, the SHU provides secure housing for inmates whose conduct endangers the safety of others or the security of the institution. *Id.*

6. The SHU is designed to maximize control of inmates who pose a definite and serious threat to the safety of others or themselves, and therefore, conditions inside the SHU are more restrictive than the conditions in general population and administrative segregation. DX B.

7. The SHU provides physical controls to prevent disorder, provide protection for others, and prevent criminal activities. *Id.*

8. Being housed in the more restrictive SHU, Fields initially remained virtually disciplinary free. 42-47. A chrono authored December 21, 2001, shows that Fields had remained disciplinary free for one year. DX A-1, p.42.

9. On April 17, 2002, Fields did not want to have a cell partner, and threatened to kill anyone that was assigned to his cell. DX A-1, p. 49-54.

10. On May 27, 2002, Fields was placed on paper tray status when he refused to relinquish his tray during trash and tray pick up. DX A-1, p.55.

B. Flooding of Plaintiff's Cell on October 10, 2002

11. On October 10, 2002, staff completed serving the SHU prisoners their evening meal and were in the process of collecting trash and trays. DX A-1, p.56, 59. Officers Ruiz and Wilbur arrived at Fields' cell and ordered him to return his tray. DX A-1, p.59. Fields would not relinquish his tray, complaining that his toilet was plugged up. DX A-1, p.59. Fields then ordered staff to make an emergency call to the plumber. DX A-1, p.59. The officers told Fields that a work order had been submitted, but Fields continued to hold his tray. DX A-1, p.59.

12. The officers notified Sergeant Fuhlrodt. DX A-1, p.59. Sergeant Fuhlrodt states that when he

arrived at plaintiff's cell he saw what appeared to be water on the floor, but he denies seeing solid matter. DX A-1, p.71. Officer Ruiz states that he cleaned the area outside of Fields' cell and instructed Fields on how to do the same using materials Fields had inside his cell. DX A-1, p.71. Fields still refused to give up his tray and Lieutenant Rabe was called. DX C-1.

13. At approximately 5:15 p.m., Lieutenant Rabe responded to Inmate Fields' cell. DX C, ¶ 4. After Fields complained about plumbing and staff, he returned his dinner tray to Lieutenant Rabe. *Id.*

14. Lieutenant Rabe contends that while listening to Fields, he scanned the area and observed that the tier in front of Fields' cell was clean and clear of any water, staff having already mopped and cleaned the area. DX C, ¶ 5. He also noted that the floor of Fields' cell was clear of both debris and water and it appeared that Fields had cleaned it. *Id.*

15. Because the areas appeared clean, Lieutenant Rabe made the decision not to remove Fields from his cell, believing it unnecessary. DX C, ¶ 6. However, had he seen debris on the floor, Lieutenant Rabe contends he would not have hesitated to remove Fields from his cell. *Id.*

16. Lieutenant Rabe contends that after ensuring that a work order to fix the plumbing problem had been completed, he authorized the placement of Fields on paper tray status as a precautionary

measure to prevent this type of future disruptions by Fields. DX C, ¶ 7.

17. Medical Technical Assistants made rounds on the tier which would have given inmate Fields the opportunity to address any medical issues he may have had.

18. A review of Fields' medical file shows that he did not seek medical treatment for either headache or nausea on October 10, 2002. DX D-1. Fields' medical record show that he did not seek medical treatment of any kind until October 30, 2002. DX D-1, p. 15.

19. The administrative segregation log shows that Fields ate breakfast, lunch and dinner on October 11, 2002. DX A-1, p.59.

20. On October 11, 2002, Fields was placed on water restriction for flooding the tier. DX A-1, p. 57.

21. Fields refused to go out to yard on October 12, 2002 but did not leave his cell to shower. DX A-1, p. 59.

22. On October 18, 2002, Fields again complained that his toilet was plugged up. DX A-1, p. 60. Officer Canfield called the plumber. DX A-1, p. 60. The plumber arrived at 2:00 p.m. and Fields' toilet was fixed by 2:30 p.m. DX A-1, p. 60.

C. Exhaustion of Administrative Remedies

23. On October 10, 2002, Fields filed a grievance complaining about his overflowing toilet. DX A-1, p. 73. He exhausted the grievance through the Director's level of review on May 28, 2003. DX A-1, p.80.

24. On October 28, 2002, Fields filed a grievance claiming that for the period beginning October 11, 2002, through November 10, 2002, since being placed on paper tray status, he was shorted rations at dinner. DX A-1, p.65. Fields requested that all inmates on paper tray status be interviewed, and that the departmental review board take action against Warden Scribner, Captain Dill, Lieutenant Rabe, Sergeant Fuhlrodt and Officers Ruiz and Wilbur. DX A-1, p.65-66.

25. Fields was interviewed by Sergeant Robinson on December 21, 2002. DX A-1, p. 69. During the interview, Fields stated he believed he had been shorted food on four occasions. DX A-1, p.69-70. Fields also stated that he had been receiving his meals without problem since November. DX A-1, p.70. Staff informed Sergeant Robinson that Fields received the same rations as other inmates. DX A-1, p.69-70. Fields' allegations were determined to be unfounded, and his appeal was denied at the first level of review. DX A-1, pp.68, 70.

26. Fields appealed to the second level of review on February 6, 2003, however, the appeal was cancelled on March 13, 2003. DX E (Declaration of V. Castillo), ¶ 5. Fields did not appeal the denial of his grievance further and did not file the grievance at the Director's level of review. DX E, ¶ 5.

3. Plaintiff's Eighth Amendment Claim

To constitute cruel and unusual punishment in violation of the Eighth Amendment, prison conditions must involve "the wanton and unnecessary infliction of pain . . . ." *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). Although prison conditions may be restrictive and harsh, prison officials must provide prisoners with food, clothing, shelter, sanitation, medical care, and personal safety. *Id.*; *Toussaint v. McCarthy*, 801 F.2d 1080, 1107 (9th Cir. 1986); *Hoptowit v. Ray*, 682 F.2d 1237, 1246 (9th Cir. 1982). Where a prisoner alleges injuries stemming from unsafe conditions of confinement, prison officials may be held liable only if they acted with "deliberate indifference to a substantial risk of serious harm." *Frost v. Agnos*, 152 F.3d 1124, 1128 (9th Cir. 1998).

The deliberate indifference standard involves an objective and a subjective prong. First, the alleged deprivation must be, in objective terms, "sufficiently serious . . . ." *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (citing *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)). Second, the prison official must "know[] of and disregard[] an excessive risk to inmate health or

safety . . .." *Farmer*, 511 U.S. at 837. Thus, a prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that inmates face a substantial risk of harm and disregards that risk by failing to take reasonable measures to abate it. *Id.* at 837-45. Prison officials may avoid liability by presenting evidence that they lacked knowledge of the risk, or by presenting evidence of a reasonable, albeit unsuccessful, response to the risk. *Id.* at 844-45. Mere negligence on the part of the prison official is not sufficient to establish liability, but rather, the official's conduct must have been wanton. *Id.* at 835; *Frost*, 152 F.3d at 1128.

"What is necessary to show sufficient harm for purposes of the Cruel and Unusual Punishment Clause depends upon the claim at issue. . . ." *Hudson v. McMillian*, 503 U.S. 1, 8 (1992). "The objective component of an Eighth Amendment claim is . . . . contextual and responsive to contemporary standards of decency." *Id.* at 8 (quotations and citations omitted). "[E]xtreme deprivations are required to make out a[n] [Eighth Amendment] conditions-of-confinement claim." *Id.* at 9 (citation omitted). With respect to this type of claim, "[b]ecause routine discomfort is part of the penalty that criminal offenders pay for their offenses against society, only those deprivations denying the minimal civilized measure of life's necessities are sufficiently grave to form the basis of an Eighth Amendment violation." *Id.* (quotations and citations omitted).

The Eighth Amendment guarantees sanitation. *Hoptowit v. Ray*., 682 F.2d 1237, 1246 (9th Cir. 1982). "Subjection of a prisoner to lack of sanitation that is severe or prolonged can constitute an infliction of pain within the meaning of the Eighth Amendment." *Anderson v. County of Kern*, 45 F.3d 1310, 1314 (9th Cir. 1995).

Sufficiently Serious Condition

Defendants submit evidence that on October 10, 2002, the toilet in plaintiff's cell overflowed and that the flooding was a result of plaintiff having plugged up his toilet. Undisputed Fact (UF) Nos. 11-16, 20. Officers contend they called the plumber and submitted a work order to fix the toilet. UF No. 11. Sergeant Fuhlrodt contends that when he arrived at plaintiff's cell, the area outside the cell was wet but he saw no solid matter. UF 11, 12. Officer Ruiz contends he cleaned the area outside the cell and instructed plaintiff how to do the same using materials inside his cell. UF 12. Lieutenant Rabe contends when he arrived at plaintiff's cell, the area was clean and he saw no debris on the floor. UF 13-14. The segregation log shows that plaintiff received all three meals in his cell the next day and two days later, he refused to go to the exercise yard. UF 19-20.

Defendants argue that plaintiff was subjected to routine discomfort for a very short period of time and this brief inconvenience fails to meet the objective element of an Eighth Amendment violation.

The court finds that defendants have met their initial burden of informing the court of the basis for their motion, and identifying those portions of the record which they believe demonstrate the absence of a genuine issue of material fact. The burden therefore shifts to plaintiff to establish that a genuine issue as to any material fact actually does exist. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 547, 586 (1986). As stated above, in attempting to establish the existence of this factual dispute, plaintiff may not rely upon the mere allegations or denials of his pleadings, but is required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in support of its contention that the dispute exists. Rule 56(e); *Matsushita*, 475 U.S. at 586 n.11; *First Nat'l Bank*, 391 U.S. at 289; *Strong v. France*, 474 F.2d 747, 749 (9th Cir. 1973).

In his opposition, plaintiff states that on October 10, 2002, he informed defendants Ruiz, Wilbur and Canfield that the plumbing in his cell was backing up, resulting in feces and urine in his cell from other cells on the tier. Plaintiff's Declaration in Opposition to Motion for Summary Judgment ("Plaintiff's Opposition"), ¶ 2. Plaintiff contends he informed the officers that the smell was causing him to have a severe headache and nausea. Plaintiff's Opposition, ¶ 3. Plaintiff contends that when defendant Fuhlrodt arrived at his cell, the contamination was still present. Plaintiff's Opposition, ¶ 7. Plaintiff also contends that when

defendant Rabe arrived at his cell, the feces, urine and contaminated water were still on his cell floor and he refused to call a plumber. Plaintiff's Opposition at ¶ 10. Plaintiff contends that defendants did not submit a work order until October 15, 2002 (Plaintiff's Opposition at ¶ 10) and that his toilet was in disrepair for 29 days. Opposition at ¶ 14.

Plaintiff has submitted evidence sufficient to create a disputed issue of fact concerning the objective component of his Eighth Amendment claim. It is undisputed that plaintiff's toilet was in disrepair. However, the parties dispute the length of time and the extent of the problem. In this Circuit, subjecting an inmate to confinement in a cell with a malfunctioning toilet for 29 days, as described by plaintiff, is sufficient to meet the objective requirement of the Eighth Amendment analysis.

Defendants' State of Mind

Defendants Ruiz, Wilbur, Canfield, Fuhlrodt and Rabe further argue that they were not deliberately indifferent to plaintiff's needs. Defendants argue that shortly after plaintiff complained about his toilet, a plumber was called and a work order submitted. UF 11. Defendant Ruiz contends that he cleaned the area outside of plaintiff's cell and instructed him how to clean the inside of his cell. UF 12. Defendant Fuhlrodt and Rabe state that they did not see debris of any kind on the floor of

plaintiff's cell and therefore did not believe plaintiff was at risk.

As described above, plaintiff disputes defendants' version of the events that occurred on October 10, 2002. Plaintiff contends that a work order was not submitted until October 15, 2002, five days after defendants were made aware of the condition. Defendants' exhibit indicates a date of October 15, 2002 and thus, it is not clear to the court when the order was actually submitted. Plaintiff disputes that defendant Ruiz cleaned the area outside of his cell and he contends the debris was still present when defendants Fuhlrodt and Rabe arrived. Moreover, he contends that defendants were not concerned about the debris and in fact refused to remove him from his cell so that the area could be cleaned.

In prison condition cases under the Eighth Amendment, prison officials act with the requisite culpable intent when they act with deliberate indifference to an inmates' suffering. *Anderson v. County of Kern*, 45 F.3d 1310, 1313 (9th Cir. 1995). Plaintiff has submitted evidence sufficient to create a triable issue of fact with respect to the subjective component of the Eighth Amendment claim.

Because the evidence set forth by plaintiff is sufficient to create a triable issue of fact with respect to whether or not plaintiff was subjected to conditions of confinement in violation of the Eighth Amendment, the court shall recommend that

defendants' motion for summary adjudication on plaintiff's Eighth Amendment claim be denied.

Plaintiff's Injuries

Defendants argue that plaintiff's alleged headache and nausea, were at most de mimimis and thus insufficient to state a claim for relief under the Eighth Amendment.

The Prison Litigation Reform Act provides that "[n]o Federal civil action may be brought by a prisoner confined in jail, prison, or other correctional facility, for mental and emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. § 1997e(e). The physical injury "need not be significant but must be more than *de minimis*." *Oliver v. Keller*, 289 F.3d 623, 627 (9th Cir. 2002). The physical injury requirement applies only to claims for mental or emotional injuries and does not bar claims for compensatory, nominal, or punitive damages. *Id.* at 630. Here, there is no indication that plaintiff is seeking compensatory damages for mental or emotional injuries and therefore defendants' argument is misplaced. There is a triable of issue of fact as to whether the conditions to which plaintiff was subjected were sufficiently serious under the Eighth Amendment analysis. An Eighth Amendment conditions of confinement claim does not require an allegation of injury that is more than de minimis. With respect to these types of claims, the issue is the nature of the deprivation, not the injury: "[b]ecause routine

discomfort is part of the penalty that criminal offenders pay for their offenses against society, only those deprivations denying the minimal civilized measure of life's necessities are sufficiently grave to form the basis of an Eighth Amendment violation."

4. Plaintiff's Retaliation Claim

Defendant's argue that plaintiff's retaliation claim against defendants Ruiz, Wilbur, Canfield and Fuhlrodt must be dismissed because he failed to exhaust his administrative remedies with regard to this claim prior to filing suit. Exhaustion motions are properly brought pursuant to the unenumerated portion of Federal Rule of Civil Procedure 12(b), *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003). The Court therefore construes this portion of defendants' motion as an unenumerated 12(b) motion.

Pursuant to the Prison Litigation Reform Act of 1995, "[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). The section 1997e(a) exhaustion requirement applies to all prisoner suits relating to prison life, *Porter v. Nussle*, 435 U.S. 516, 532 (2002), and requires prisoners to complete the prison's administrative process, regardless of the relief sought by the prisoner and regardless of the relief offered by the process, as long

as the administrative process can provide some sort of relief on the complaint stated,[3] *Booth v. Churner*, 532 U.S. 731, 741 (2001). "All 'available' remedies must now be exhausted; those remedies need not meet federal standards, nor must they be "plain, speedy, and effective."' *Porter*, 534 U.S. at 524 (citing to Booth, 532 U.S. at 739 n.5). "Proper exhaustion[, which] demands compliance with an agency's deadlines and other critical procedural rules ...." is required, *Woodford v. Ngo*, 126 S.Ct. 2378, 2386 (2006), and may not be satisfied "by filing an untimely or otherwise procedurally defective ... appeal," *id.* at 2382. Finally, exhaustion must occur prior to filing suit. *McKinney v. Carey*, 311 F.3d 1198, 1199-1201 (9th Cir. 2002).

Section 1997e(a) does not impose a pleading requirement, but rather, is an affirmative defense

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[3] The California Department of Corrections has an administrative grievance system for prisoner complaints. Cal. Code Regs., tit 15§ 3084.1. The process is initiated by submitting a CDC Form 602. *Id.* at § 3084.2 (a). Four levels of appeal are involved, including the informal level, first formal level, second formal level, and third formal level, also known as the "Director's Level." *Id.* at § 3084.5. Appeals must be submitted within fifteen working days of the event being appealed, and the process is initiated by submission of the appeal to the informal level, or in some circumstances, the first formal level. *Id.* at §§ 3084.5, 3084.6(c).

under which defendants have the burden of raising and proving the absence of exhaustion. *Wyatt*, 315 F.3d at 1119. The failure to exhaust non-judicial administrative remedies that are not jurisdictional is subject to an unenumerated Rule 12(b) motion, rather than a summary judgment motion. *Id.* (citing *Ritza v. Int'l Longshoremen's &Warehousemen's Union*, 837 F.2d 365, 368 (9th Cir. 1998) (per curium)). In deciding a motion to dismiss for failure to exhaust administrative remedies, the Court may look beyond the pleadings and decide disputed issues of fact. *Wyatt*, 315 F.3d at 1119-20. If the Court concludes that the prisoner has failed to exhaust administrative remedies, the proper remedy is dismissal without prejudice. *Id.*

Defendants present evidence, and plaintiff does not dispute, that he filed a grievance against defendants Ruiz, Wilbur, Canfield and Fuhlrodt on October 28, 2002, alleging that they were retaliating against him by withholding a portion of his dinner. UF 24, Comp. P. 9, ¶ 41. Plaintiff's appeal was denied at the first level of review on December 21, 2002. UF 25. Plaintiff submitted the appeal to the second level of review where it was cancelled on March 13, 2003. UF 26. Plaintiff did not pursue the appeal to the Director's Level. UF 26.

In opposition, plaintiff argues that on March 13, 2003, his appeal was assigned to an unknown prison official with a due date of June 11, 2003. Plaintiff appears to argue that since his appeal was never

answered, his administrative remedies were exhausted. However, plaintiff provides no evidence that he submitted the appeal to the Director's Level or even attempted to do so.

"[Proper] exhaustion of administrative remedies is necessary," *Woodford v. Ngo*, 126 S.Ct. 2378, 2382 (2006), and "[p]roper exhaustion demands compliance with an agency's deadlines and other critical procedural rules...," *id.* at 2386. The court is mindful that the failure to respond to a properly filed grievance may result in a finding that exhaustion occurred. *Lewis v. Washington*, 300 F.3d 829, 833 (7th Cir. 2002) (when prison officials fail to respond, the remedy becomes unavailable, and exhaustion occurs); *Foulk v. Charrier*, 262 F.3d 687, 698 (8th Cir. 2001) (district court did not err when it declined to dismiss claim for failure to exhaust where prison failed to respond to grievance); *see also Brown v. Valoff*, 422 F.3d 926, 943 n.18 (9th Cir. 2005). Here, however, plaintiff has not submitted any evidence demonstrating that he timely pursued his appeal beyond the second level. Although plaintiff does submit evidence that he submitted his an [sic] appeal of the retaliation claim on October 28, 2002, that appeal was cancelled, and he failed to pursue the appeal to the Director's Level. "Proper exhaustion[, which] demands compliance with an agency's deadlines and other critical procedural rules...." is required, *Woodford v. Ngo*, 126 S.Ct. 2378, 2386 (2006), and may not be satisfied "by filing an untimely or otherwise procedurally

defective...appeal," *id.* at 2382. *Woodford*, 126 S.Ct. at 2382. Plaintiff's retaliation claim must therefor be dismissed without prejudice.

5. Qualified Immunity.

Finally, defendants argue that to the extent the court finds plaintiff has stated a claim for relief, they are entitled to qualified immunity from plaintiff's claims for damages. Qualified immunity shields government officials from civil damages unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In ruling upon the issue of qualified immunity, the initial inquiry is whether, taken in the light most favorable to the party asserting the injury, the facts alleged show the defendant's conduct violated a constitutional right. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). If, and only if, a violation can be made out, the next step is to ask whether the right was clearly established. *Id.* In determining whether the right was clearly established, the inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition...." *Id.* [T]he right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 202. (internal quotations and citation

omitted). In resolving these issues, the Court must view the evidence in the light most favorable to Plaintiff and resolve all material factual disputes in favor of Plaintiff. *Martinez v. Stanford*, 323 F.3d 1178, 1184 (9th Cir. 2003).

As set forth in the preceding section of this order, there are disputed issues of material fact regarding plaintiff's allegations that he was left in a cell with an overflowing toilet for 28 days in violation of the Eighth Amendment. Viewing the evidence in the light most favorable to plaintiff, the conduct complained of violated the Eighth Amendment. *Lopez*, 203 F.3d at 1132-33; *Allen*, 48 F.3d at 1086-88.

Turning to the second step in the analysis, in 2002, when the deprivation at issue began, the law was clearly established that subjecting a prisoner to lack of sanitation that is severe or prolonged can constitute an infliction of pain that violates the Eighth Amendment such that it would have been reasonably clear to a reasonable officer that leaving an inmate in a cell with a non-functioning toilet for 28 days would violate his rights. While defendants contend they contacted a plumber as soon as they were made aware of the condition and defendant Rabe contends that by the time he arrived and plaintiff's cell, there was no visible water or debris, plaintiff disputes defendants' version of the facts. Finally, it was clearly established in 2002 that if Defendants knew of the violation and failed to take

steps to prevent it, they could be held liable for the violation. *Cunningham*, 229 F.3d at 1289; *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).

In conclusion, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). By 2002, requiring an inmate to live in a cell with a malfunctioning toilet for 28 days constituted a knowing violation of the Eighth Amendent. *Lopez* at 1133; *Allen* at 1088. Accordingly, Defendants are not entitled to judgment as a matter of law based on qualified immunity.

D. Conclusion

The court finds that there are disputed issues of material fact precluding summary judgment on plaintiff's Eighth Amendment claim and defendants are not entitled to qualified immunity. The court also finds that plaintiff failed to exhaust the administrative remedies with regard to his retaliation claim and therefore this claim must be dismissed without prejudice. Based on the foregoing, it is HEREBY RECOMMENDED that plaintiff's motion for voluntary dismissal of defendants Robertson and Dill, filed April 11, 2007 be GRANTED; defendants' motion for summary judgment, filed December 21, 2006 be GRANTED IN PART as described herein; and this case proceed to trial on plaintiff's Eighth Amendment claims against defendants Ruiz, Wilbur, Canfield, Fuhlrodt and Rabe.

These Findings and Recommendations will be submitted to the United States District Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). On or before July 25, 2007, the parties may file written objections with the court. The document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

IT IS SO ORDERED.

Dated: June 22, 2007

/s/ Dennis L. Beck
UNITED STATES MAGISTRATE JUDGE

UNITED STATE DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
HON. LAWRENCE J. O'NEILL
1:03-cv-6364 LJO
JURY TRIAL, DAY 1

- x

KEVIN E. FIELDS

Plaintiff,

v.

RUIZ et al.,

Defendants.

- x

Fresno, California Wednesday, May 28, 2008

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Vol. 1, pgs. 1 to 231, inclusive

REPORTED BY: PEGGY J. CRAWFORD, RDR, CRR, Official Reporter

APPEARANCES OF COUNSEL:

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By: **KELLI M. HAMMOND**
Deputy Attorney General

. . . . . .

...

So stop playing games. I know that you believe that you are not playing games, or perhaps that's just what you are saying and you know you are playing games.MR. FIELDS: No, I don't know that.

THE COURT: But I'm telling you that there is nothing in this record to establish, other than what you are saying, that there is any appellate issue with regard to your medication.

And I'm telling you from an objective standpoint, there is nothing there except your words because, objectively, there is nothing to establish or to substantiate your position.

Now I think you and I have both made our statements on the record clear.

MR. FIELDS: One more thing. You said all my motion have been ruled on. Actually, I have an outstanding motion for reconsideration that has never been ruled on.

THE COURT: Reconsideration for what?

MR. FIELDS: For appointment of counsel.

THE COURT: I believe that's the sixth request that you have made for counsel - -

MR. FIELDS: No, it is not.

THE COURT: I believe it is the sixth request. We are not going to continue to play that game either.

They have been denied and there is nothing new. Your motion for reconsideration is not legally sound and it is denied.

If that's what you want as a ruling, you got it.

Now we are ready for the jury.

MR. FIELDS: Your Honor, God doesn't like ugly.

THE COURT: I beg your pardon?

MR. FIELDS: God doesn't like ugly.

THE COURT: I don't know what that means, but it's not worth pursuing.

(Plaintiff spoke under his breath.)

THE COURT: Sir, we had a motion, we ruled on it.

Now the jury is coming in.

(The following proceedings were had in the presence of the jury, to wit:)

THE COURT: We are still on the record and the jury has joined us.

Who are you calling now as a witness?

MR. FIELDS: Inmate Bland.

JOMO BLAND,

called as a witness on behalf of the Plaintiff, having been first duly sworn, testified as follows:

THE COURT: Could you tell us your name?

THE WITNESS: Jomo Bland.

THE COURT: How do you spell your first name?

THE WITNESS: J-o-m-o.

...

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CASE NO. 1:03-cv-06364-OWW DLB PC

ORDER RE MOTIONS TO APPOINT COUNSEL
(Docs. 182, 183)

KEVIN E. FIELDS

Plaintiff,

v.

RUIX et al.,

Defendants.

Plaintiff is a state prisoner proceeding pro se and in forma pauperis with a civil rights action pursuant to 42 U.S.C. section 1983. This action is proceeding on plaintiff's second amended complaint, filed February 9, 2004, against defendants Ruiz, Wilbur, Canfield, Fuhlrodt and Rabe for violation of the Eighth Amendment. This matter is set for jury trial on May 27, 2008 at 9:00 a.m. before the Honorable Judge Wanger.

On April 23, 2008, plaintiff filed a motion stylized as a letter, in which plaintiff requests that that all six inmate witnesses listed in defendant's pre-trial statement be permitted to testify at trial. (Doc. 182). Plaintiff further requests that the court request pro bono counsel to represent him. Finally, plaintiff seeks an order directing the Clerk of the Court to provide plaintiff with a transcript of the telephonic trial confirmation hearing held April 24, 2008, on the grounds that because of medication he is currently taking, his memory of the conference is "kind of fuzzy".

On April 24, 2008, plaintiff filed another motion for the appointment of counsel. (Doc. 183).

1. Motion for Attendance of Incarcerated Witnesses

During the telephonic trial confirmation hearing held April 24, 2008, plaintiff agreed that four of plaintiff's six proposed inmate witnesses were not required at trial, as their testimony would be duplicative. Plaintiff now states in his instant motion that their testimony is relevant to prove state of mind, and that all six proposed witnesses ought to testify at trial.

Notwithstanding plaintiff's concession during the telephonic trial confirmation hearing that four of his proposed inmate witnesses were not necessary at trial, plaintiff has not filed any declarations stating that his proposed incarcerated witnesses have actual knowledge of relevant facts. Plaintiff was explicitly

informed that he was required to do so by this court's order dated November 2, 2007, which described in detail for plaintiff the procedure for obtaining the attendance of incarcerated witnesses. (Doc. 166). Plaintiff was further placed on notice of this requirement in defendants' pre-trial statement, wherein defendants objected to the attendance of plaintiff's inmate witnesses on these very grounds. (Doc. 176, pp.4-5). Plaintiff's bare contention that their testimony is now relevant to show "state of mind" is not supported whatsoever by any evidence.

Therefore, the court will not issue transportation writs for Inmate E. Johnson, Inmate G. Jones, Inmate White, or Inmate Smith. As provided for in this court's pre-trial order (doc. 185), inmate witnesses Bland and German will attend at trial, and the clerk of the court will prepare transportation writs to facilitate their attendance.

2. Request for Court Transcripts

There is no provision under the Federal Rules or the Local Rules for free copies of transcripts. Further, the expenditure of public funds on behalf of an indigent litigant is proper only when authorized by Congress. *See Tedder v. Odel*, 890 F.2d 210 (9th Cir. 1989) (citations omitted). The in forma pauperis statute does not authorize the expenditure of public funds for the purpose sought by plaintiff in the instant motion. If plaintiff wishes to order a copy of the transcript, he is required to pay the appropriate

fee to the court reporter. Plaintiff's request for free copies of the transcript is DENIED.

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3. Motion for Appointment of Counsel

Plaintiff contends that in the past, the court denied plaintiff's requests for appointment of counsel without considering a) the merits of the case; b) plaintiff's ability to present and comprehend his case; c) his custody status; d) the complexity of the legal issues involved; and e) the amount of factual investigation and discovery necessary to prove the claim. (Doc. 183, p.2). Plaintiff now renews his request for the appointment of counsel.

A review of the court record indicates that plaintiff has filed at least four requests for appointment of counsel (Docs. 74, 86, 98 and 147). Each of plaintiff's previous requests were denied. (Docs. 78, 90, 100 and 163). In each case, it was explained to plaintiff that the United States Supreme Court has ruled that district courts lack authority to require counsel to represent indigent prisoners in § 1983 cases. *Mallard v. United States District Court for the Southern District of Iowa*, 490 U.S. 296, 109 S.Ct. 1814 (1989). Plaintiff was further advised that in certain exceptional circumstances, the court may request the voluntary assistance of counsel pursuant to 28 U.S.C. § 1915(e)(1). Without a reasonable method of securing and compensating counsel, this court will

seek volunteer counsel only in the most serious and exceptional cases.

In the present motion, the court does not find the required exceptional circumstances. Even if it is assumed that plaintiff is not well versed in the law and that he has made serious allegations, which proved, would entitle him to relief, his case is not exceptional. Further, plaintiff appeared lucid, and was capable of thinking and expressing himself clearly, throughout the telephonic trial confirmation hearing that lasted approximately one hour. Accordingly, plaintiff's request for counsel is DENIED.

IT IS SO ORDERED.

Dated: April 30, 2008

/s/ Dennis L. Beck
UNITED STATES MAGISTRATE JUDGE

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

1:03-cv-06364-OWW DLB (PC)

ORDER DENYING FOURTH MOTION FOR APPOINTMENT OF COUNSEL (DOCUMENTS #182 & #183)

- - - -

exceptional circumstances the court may request the voluntary assistance of counsel pursuant to section 1915(e)(1). *Rand*, 113 F.3d at 1525.

Without a reasonable method of securing and compensating counsel, the court will seek volunteer counsel only in the most serious and exceptional cases. In determining whether "exceptional circumstances exist, the district court must evaluate both the likelihood of success of the merits [and] the ability of the [plaintiff] to articulate his claims *pro se* in light of the complexity of the legal issues involved." *Id.* (internal quotation marks and citations omitted).

In the present case, the court does not find the required exceptional circumstances. Even if it is assumed that plaintiff is not well versed in the law and that he has made serious allegations which, if proved, would entitle him to relief, his case is not exceptional. This court is faced with similar cases almost daily. Further, at this early stage in the proceedings, the court cannot make a determination that plaintiff is likely to succeed on the merits, and based on a review of the record in this case, the court does not find that plaintiff cannot adequately articulate his claims. *Id.*

For the foregoing reasons, plaintiff's motion for the appointment of counsel is HEREBY DENIED, without prejudice.

IT IS SO ORDERED.

Dated: April 28, 2008

/s/ **Dennis L. Beck**
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

1:03-CV-06364-OWW-DLB-P

ORDER DENYING MOTION FOR APPOINTMENT OF COUNSEL
(DOCUMENT #147)

- - - -

In certain exceptional circumstances, the court may request the voluntary assistance of counsel pursuant to 28 U.S.C. § 1915(e)(1). Without a reasonable method of securing and compensating counsel, this court will seek volunteer counsel only in the most serious and exceptional cases.

In the present case, the court does not find the required exceptional circumstances. Even if it is assumed that plaintiff is not well versed in the law and that he has made serious allegations which, if proved, would entitle him to relief, his case is not exceptional. This court is faced with similar cases almost daily. Therefore, plaintiff's request for the appointment of counsel must be denied.

In accordance with the above, IT IS HEREBY ORDERED that plaintiff's request for the appointment of counsel is denied.

IT IS SO ORDERED.

Dated: September 24, 2007

/s/ Dennis L. Beck
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

1:03-cv-6364-OWW-DLB-P

ORDER DENYING MOTION FOR APPOINTMENT OF COUNSEL
(DOCUMENT #98)

KEVIN E. FIELDS

Plaintiff,

v.

J. P. RUIZ, et al.,

Defendants.

Plaintiff has once again requested the appointment of counsel. As plaintiff has been advised, the United States Supreme Court has ruled that district courts lack authority to require counsel to represent indigent prisoners in § 1983 cases. *Mallard v. United States District Court for the Southern District of Iowa*, 490 U.S. 296, 109 S.Ct. 1814 (1989).

In certain exceptional circumstances, the court may request the voluntary assistance of counsel pursuant to 28 U.S.C. § 1915(e)(1). Without

a reasonable method of securing and compensating counsel, this court will seek volunteer counsel only in the most serious and exceptional cases.

In the present case, the court does not find the required exceptional circumstances. Even if it is assumed that plaintiff is not well versed in the law and that he has made serious allegations which, if proved, would entitle him to relief, his case is not exceptional. This court is faced with similar cases almost daily. Therefore, plaintiff's request for the appointment of counsel must be denied.

In accordance with the above, IT IS HEREBY ORDERED that plaintiff's request for the appointment of counsel is denied.

IT IS SO ORDERED

Dated: February 9, 2006

/s/ Dennis L. Beck
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
1:03-CV-6364-OWW-DLB-P

ORDER DENYING MOTION FOR APPOINTMENT OF COUNSEL
(DOCUMENT #86)

KEVIN E. FIELDS

Plaintiff,

v.

J. P. RUIZ, et al.,

Defendants.

Plaintiff has requested the appointment of counsel. The United States Supreme Court has ruled that district courts lack authority to require counsel to represent indigent prisoners in § 1983 cases. *Mallard v. United States District Court for the Southern District of Iowa*, 490 U.S. 296, 109 S.Ct. 1814 (1989).

In certain exceptional circumstances, the court may request the voluntary assistance of

counsel pursuant to 28 U.S.C. § 1915(e)(1). Without a reasonable method of securing and compensating counsel, this court will seek volunteer counsel only in the most serious and exceptional cases.

In the present case, the court does not find the required exceptional circumstances. Even if it is assumed that plaintiff is not well versed in the law and that he has made serious allegations which, if proved, would entitle him to relief, his case is not exceptional. This court is faced with similar cases almost daily. Therefore, plaintiff's request for the appointment of counsel must be denied.

In accordance with the above, IT IS HEREBY ORDERED that plaintiff's request for the appointment of counsel is denied.

IT IS SO ORDERED

Dated: December 21, 2005

/s/ Dennis L. Beck
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
1:03-CV-06364-OWW-DLB-P

ORDER DENYING MOTION FOR APPOINTMENT OF COUNSEL
(DOCUMENT #74)

- - - -

counsel pursuant to 28 U.S.C. § 1915(e)(1). Without a reasonable method of securing and compensating counsel, this court will seek volunteer counsel only in the most serious and exceptional cases.

In the present case, the court does not find the required exceptional circumstances. Even if it is assumed that plaintiff is not well versed in the law and that he has made serious allegations which, if proved, would entitle him to relief, his case is not exceptional. This court is faced with similar cases almost daily. Therefore, plaintiff's request for the appointment of counsel must be denied.

In accordance with the above, IT IS HEREBY ORDERED that plaintiff's request for the appointment of counsel is denied.

IT IS SO ORDERED.

Dated: November 21, 2005

/s/ Dennis L. Beck
UNITED STATES MAGISTRATE JUDGE

FILED

MAR 01 2010

Molly C. Dwyer, Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 08-16598

D.C. No. 1:03-cv-06364-LJO-DLB
Eastern District of California, Fresno

ORDER

KEVIN E. FIELDS

Plaintiff - Appellant,

v.

WILBUR et al.,

Defendants - Appellees.

Before: COWEN,* GRABER, and BYBEE,
Circuit Judges.

Judges Graber and Bybee have voted to deny the petition for rehearing en banc, and Judge Cowen has so recommended.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it.

The petition for rehearing en banc is DENIED.

* The Honorable Robert E. Cowen, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

STATE OF CALIFORNIA
DEPARTMENT OF CORRECTIONS

INMATE/PAROLEE APPEAL FORM
CDC 602 (12/87)

Location: Institution/Parole Region

1. CSP Corcoran

Log No.

1. 02-03865

Category: 9B

You may appeal any policy, action or decision which has a significant adverse affect upon you. With the exception of Serious CDC 115s, classification committee actions, and classification and staff representative decisions, you must first informally seek relief through discussion with the appropriate staff member, who will sign your form and state what action was taken. If you are not then satisfied, you may send your appeal with all the supporting documents and not more than one additional page of comments to the Appeals Coordinator within 15 days of the action taken. No reprisals will be taken for using the appeals procedure responsibly.

NAME: Fields, Kevin

NUMBER: P83425

ASSIGNMENT: (4A) Security Housing Unit

UNIT/ROOM NUMBER: 4R-22

A. Describe Problem: Appellant was placed on paper tray status on 10/10/02, for holding his dinner tray because third watch staff attempted to feed him in a cell which had human excrement and urine floating around which was caused by the plumbing backup up in cell's # 22-23-32-33, as a result of holding the tray so that the building Sgt., and Lt. Rabe, could be notified which ended with unsatisfactory results. Appellant was placed on paper-
(cont. on additional page)

B. Action Requested: Appellant request the following: (1) That an audit be conducted, and that all inmates placed on paper-tray status be interviewed. (2) That upon completion of an internal investigation, that this matter be (cont.)

Inmate/Parolee Signature: s/ Kevin Fields
#P83425

Date Submitted: 10/28/02

C. Informal Level (Date Received: _____)

Staff Response: BYPASS

CSP - CORCORAN
APPEALS OFFICE
02-NOV 13 PM 12:40

D. Formal Level
If you are dissatisfied, explain below, attach supporting documents (Completed CDC 115, Investigator's Report, Classification chrono, CDC 128, etc.) and submit to the Institution/Parole Region Appeals Coordinator for processing within 15 days of receipt of response.

BYPASS

CSP - CORCORAN
APPEALS OFFICE
03 FEB 11 PM 2:53

4/4/03

First Level: ☐ Granted ☐ P. Granted ☑ Denied ☐ Other MAR 27 2003

E. Reviewer's Action (Complete within 15 working days): Date assigned: NOV 15 2002 **Due date:** 1/2/03

Interviewed by: Sgt. D. Robertson see attached.

Staff Signature: s/ [illegible]
Title: Captain
Date Completed: 12/30/02
Division Head Approved:
Signature: s/ [illegible]

Title: [illegible]
Returned Date to Inmate: JAN 13 2003

F. If dissatisfied, explain reasons for requesting a Secone-Level Review, and submit to Institution or Parole Region Appeals Coordinator within 15 days of receipt of response.

I am dissatisfied with the staff response and the staff stamped this appeal on Jan. 13, 2003, however I didn't receive it until Feb. 6, 2003, meaning that staff are intentionally violating the time constraints in CCR Title 15, § 3084.6

Signature: s/ Kevin Fields

Date Submitted: 2/6/2003

Second Level: ☐ Granted ☐ P. Granted ☐ Denied ☐ Other

G. Reviewer's Action (Complete within 10 working days): Date assigned: MAR 13 2003
Due Date: 4/11/03

CSP - CORCORAN
APPEALS OFFICE
03 FEB 11 AM 11:37

CSP - CORCORAN
APPEALS OFFICE
03 MAR 12 PM 10:55

H. If dissatisfied, add data or reasons for requesting a Director's Level Review, and submit by mail to the third level within 15 days of receipt of response.

Signature: _____ **Date Submitted:** _____

For the Director's Review, submit all documents to:

Director of Corrections
P.O. Box 942883
Sacramento, CA 94283-0001
Attn: Chief, Inmate Appeals

Director's Action: ☐ Granted ☐ P. Granted ☐ Denied ☐ Other

Date: _____

(Cont of A.) status, beginning [sic] on 10/11/02, thru 11/10/02, thus Appellant has been violated of his rights guaranteed by C.C.R. Title 15 Section(s) 3004.(a), 3343.(d). During third watch, and since the commencement of being placed on the forementioned

status, [sic] Appellant's dinner tray has been substantially short, and staff [sic] nor their supervisors have done nothing to rectify this problem, thus subjecting Appellant to cruel and unusual punishment. Violating Appellant's due process rights protected by the United States Constitutional Rights under the 8th Amendment, and California's Constitutional Rights under Article I, Section 17;

(Cont of B (action requested)) referred to the Departmental Review Board, for the appropriate actions against the following staff, A K Scribner, N. Dill, Lt. Rabe, Sgt. F. Fuhlrodt, C/O Ruiz, and C/O Wilbur, 4A4R Building Staff. (3) That Appealant not be retaliated against for exercising his appeal rights, by (1) moving appealant to another unit, or by further discrimination with his evening meal.

s/ Kevin Fields #P83425, 10/28/02

California Depatment of Corrections
MEMORANDUM

Facility Captain's Office
IV-A, SHU

FIRST FORMAL LEVEL APPEAL RESPONSE

Date: December 21, 2002

To: Inmate Fields, P 38425

Subject: FIRST LEVEL RESPONSE TO CDC 602, LOG NO. CSP-COR 02-03865

APPEAL DECISION: DENIED

INTERVIEWED BY: D. Robertson, Correctional Sgt.

APPEAL ISSUE: Staff Complaint

APPEAL RESPONSE: Sergeant Robertson interviewed you on December 21, 2002 regarding your allegation of staff misconduct. In addition to your interview a fact-finding inquiry was conducted concerning all staff and inmates involved.

An investigation was initiated and has been completed. The findings are confidential and shall not be disclosed. If any misconduct was discovered, appropriate corrective action will be taken.

Considering the above information your appeal is DENIED at the first level of review. Allegations of misconduct are NOT SUSTAINED.

/s NATE DILL
Facility Captain
Facility IV-A

/s D.D. ORTIZ
Associate Warden
Facility IV-A

STATE OF CALIFORNIA—YOUTH AND ADULT CORRECTIONAL AGENCY
GRAY DAVIS, Governor

DEPARTMENT OF CORRECTIONS
Inmate Appeals Branch
P.O. Box 942883
Sacramento, CA 94283-0001

March 24, 2003

Fields, CDC #P-83425
California State Prison, Corcoran
P.O. Box 8800
Corcoran, CA 93212-8800

Re:

Dear Mr. Fields:

The enclosed documents are being returned to you for the following reasons:

This office provides the Director's Level Review of inmate/parolee appeals. The form must be completed through the Second Level of Review on behalf of the Warden or Parole Region Administrator. Your appeal was rejected,

withdrawn or cancelled. If you disagree with that decision, contact the Appeals Coordinator. You must comply with instructions from that office.

Your assigned counselor, the Appeals Coordinator, or your Parole Agent can answer any questions you may have regarding the appeals process. Library staff can help you obtain any addresses you need.

/s/ N. Grannis

N. GRANNIS, Chief

Inmate Appeals Branch